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In The

# Supreme Court of the United States

October Term, 1993

PAUL W. BONAPFEL, Chapter 7 Trustee
for the Bankruptcy Estate of
CARPET CENTER LEASING CO., INC.,

*Petitioner,*

v.

NALLEY MOTOR TRUCKS, a Division of
NALLEY CHEVROLET, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner has established a sufficient basis pursuant to Sup.Ct.R. 10 to justify a grant of certiorari by the Supreme Court?

2. Whether the courts below properly ruled upon the issues adjudicated between Petitioner and Respondent, thereby justifying the award of $370,915.96 to Respondent pursuant to 11 U.S.C. § 507(b)?

## PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Pursuant to Sup.Ct.R. 29.1, Respondent is Nalley Motor Trucks, a division of Nalley Chevrolet, Inc., the latter being a corporation that has not issued any shares of common stock to the public. There are no other parent companies or subsidiaries of Nalley Motor Trucks or Nalley Chevrolet, Inc.

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Nalley Motor Trucks, a division of Nalley Chevrolet, Inc., respectfully urges that this Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 991 F.2d 682 (11th Cir. 1993) and at 4 F.3d 940 (11th Cir. 1993).[1]

## OPINIONS BELOW

After a full day trial conducted on February 26, 1991, the United States Bankruptcy Court for the Northern District of Georgia, Rome Division, entered an order on March 12, 1991, awarding Respondent an administrative priority claim in the amount of $370,915.96 pursuant to 11 U.S.C. § 507(b). The award was based upon the diminution in value to Respondent's collateral[2] that occurred because of Debtor's use and benefit of Respondent's collateral during the pendency of the Chapter 11 bankruptcy proceeding and because of the imposition of the automatic stay in bankruptcy. The Bankruptcy Court held that the existence of Respondent's claim as well as the measurement of the diminution in value of Respondent's collateral pursuant to 11 U.S.C. § 507(b) were to be determined according to federal equitable principles, *not* the Georgia Motor Vehicle Sales Finance Act ("MVSFA"), O.C.G.A. § 10-1-36, or Georgia's Uniform Commercial Code, O.C.G.A. § 11-9-504(3). The award was also based upon Respondent's extensive photographic records[3] and Used Vehicle Appraisal Reports that were admitted into evidence by the Bankruptcy Court, as well as Respondent's expert witness testimony. The trial transcript, exclusive of the referenced photographic records and Used Vehicle Appraisal Reports, exceeds two

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[1] In response to the Petition for Rehearing and Suggestion of Rehearing En Banc filed by Petitioner, the Eleventh Circuit's second reported opinion expanded the scope of the former decision.

[2] Originally consisting of twenty-six (26) over-the-road tractors.

[3] Attached to the trial transcript is Respondent's Exhibit No. 1, which collectively refers to thirty-seven (37) photographs that were taken by Respondent of the tractors within a day or two of their return to Respondent. *Counsel for Petitioner stipulated to their admission into evidence without objection.*

hundred pages. Petitioner failed to proffer any photographic evidence or Used Vehicle Appraisal Reports of his own, and instead merely relied upon the evidence introduced by Respondent at trial. The Bankruptcy Court's March 12, 1991 order is included in Appendix C of the Petition.

Petitioner appealed to the United States District Court for the Northern District of Georgia, Rome Division. After extensive briefing, the District Court entered an order on January 31, 1992, affirming the Bankruptcy Court's determination in favor of Respondent. The District Court held that the Petitioner's arguments were not supportable based upon the factual, legal and equitable considerations of the case. The District Court also held that the existence of Respondent's claim as well as the measurement of the diminution in value of Respondent's collateral pursuant to 11 U.S.C. § 507(b) were to be determined according to federal equitable principles, *not* the Georgia MVSFA or the Georgia Uniform Commercial Code. The District Court's January 31, 1992 decision is included in Appendix B of the Petition.

Petitioner then appealed to the United States Court of Appeals for the Eleventh Circuit. After extensive briefing, as well as oral argument conducted on December 1, 1992 at Petitioner's request, the Court of Appeals on May 20, 1993 entered its opinion affirming the Orders of the District Court and the Bankruptcy Court. 991 F.2d 682 (11th Cir. 1993). The Court of Appeals expressly determined that Respondent was entitled to an administrative expense claim based upon a variety of factors, as stated in the opinion. The Court of Appeals further determined that Respondent's claim for administrative expenses under 11 U.S.C. § 507(b) was *not* a claim for a deficiency on the underlying contractual obligation that financed the Debtor's purchase of the collateral. The Court of Appeals' May 20, 1993 decision is included in Appendix A of the Petition.

Petitioner then sought further review from the Court of Appeals by filing a Petition for Rehearing and Suggestion of Rehearing En Banc. As circumscribed by 11th Cir.R. 35-3, the Petition for Rehearing En Banc was denied because Petitioner failed to establish that the Panel Opinion issued on

May 20, 1993 was in *direct conflict* with precedent of the Eleventh Circuit or the Supreme Court. As further circumscribed by 11th Cir.R. 35-3, the Petition for Rehearing before the Panel itself was also denied. The September 30, 1993 opinion of the Court of Appeals is reported at 4 F.3d 940 (11th Cir. 1993) and is included in Appendix D of the Petition.

## STATUTORY PROVISIONS INVOLVED IN THIS CASE

The following statutes are pertinent to the consideration of the Petition: 11 U.S.C. § 362(d)(1); 11 U.S.C. § 503(b); and 11 U.S.C. § 507(b). These statutes are reprinted in Appendix E of the Petition.

## STATEMENT OF THE CASE

Respondent adopts in substantial part the "Background" section of the Eleventh Circuit's May 20, 1993 opinion reported at 991 F.2d 682, 684-685 (11th Cir. 1993), copied in Appendix A of the Petition, pages 2a through 4a,[4] as well as the "Facts" section of the District Court's January 31, 1992 decision, copied in Appendix B of the Petition, pages 15a through 18a.[5]

While there are various facts that have been omitted or misstated by the Petitioner in his Statement of the Case, in the interest of brevity, Respondent will comply with Sup.Ct.R. 15.1 by limiting its remarks to the most substantial and oft-

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[4] The Court of Appeals' opinion contains a typographical error at page 2a, Appendix A of the Petition. The Court of Appeals' opinion refers to a March 3, 1993 consent order lifting the automatic stay that was entered into between Paccar Financial Corporation (Respondent's predecessor-in-interest) and Petitioner. The actual date of the consent order was March 30, 1993, the very day that Petitioner sought to convert the case to Chapter 7 of the Bankruptcy Code.

[5] The District Court's decision contains a typographical error at page 16a, Appendix B of the Petition. The District Court's decision refers to a Motion for Relief from Stay filed by Respondent's predecessor-in-interest, Paccar Financial Corporation, on March 30, 1987. The actual filing date of the Motion was March 20, 1987, less than one month after the bankruptcy case was filed on February 25, 1987.

repeated factual and legal mischaracterizations and omissions contained in Petitioner's Statement of the Case, as enumerated in the twelve (12) points outlined below:

(1) Petitioner repeatedly asserts that Respondent, through its predecessor-in-interest, Paccar Financial Corporation ("Paccar"), was attempting to seek authorization to exercise its "state law rights" with respect to its collateral. While it is true that Respondent, and its predecessor-in-interest, Paccar (collectively referred to hereafter as "Respondent"), were seeking to lift the automatic stay in order to repossess the collateral, there is no factual record in this case to establish that Respondent's primary goal was to "exercise its state law rights with respect to the collateral."

Indeed, for purposes of interpreting 11 U.S.C. § 507(b), the Bankruptcy Code provision at issue in this case, Respondent's goals under state law are completely irrelevant. Throughout this case, Respondent has not asserted a *deficiency* against the Petitioner pursuant to Georgia state law.

Rather, Respondent sought a superpriority administrative expense pursuant to 11 U.S.C. § 507(b) because of the *diminution in value* of its collateral during the pendency of the bankruptcy case and the inadequacy of adequate protection payments received.

(2) Petitioner alleges that he immediately consented to an order to allow Paccar to "foreclose its security interest in the aforesaid collateral in accordance with the laws of the State of Georgia or any other state in which the collateral is located."

In actuality, the March 30, 1988 consent order granted Paccar the "*right* to foreclose its security interest in the aforesaid collateral in accordance with the laws of the State of Georgia or any other state in which the collateral is located." (Emphasis supplied.) This language by its express terms was permissive, not mandatory, and it did not impose any additional obligations upon Paccar in connection with its disposition of the collateral.

Most significantly, Petitioner failed to advise this Court of additional language, contained in the very same order, that

granted Paccar relief from the automatic stay to obtain possession of the collateral and which provided, in pertinent part:

> The within order is . . . entered *without prejudice* to the Movant [Respondent] *in regard to Movant's right to assert an administrative claim in regard to the adequate protection payments which were not made by Debtor, and without prejudice to Movant's right to assert any other claims it may have against the Estate of Debtor.* (Emphasis supplied.) (BR.177-178).[6]

The referenced consent order was signed by the Petitioner and the attorney for the Creditors' Committee.

(3) Petitioner alleges that "Respondent asserted two claims against the Debtor. One was an alleged unsecured (deficiency) claim in the amount of $413,561.71. The other claim was a claim for a superpriority administrative expense in the exact same amount." Nothing could be further from the truth.

Throughout this case, beginning with Respondent's Administrative Expense Motion, Respondent has not asserted a *deficiency* against the Petitioner pursuant to the provisions of the Georgia MVSFA. A state law contractual deficiency claim, founded upon a pre-petition contract, is entirely different from a *diminution in value* claim asserted pursuant to 11 U.S.C. § 507(b). The latter arose subsequent to and as a direct consequence of the bankruptcy and was intended to compensate Respondent, a secured creditor, for the reduction in value to its collateral due to the imposition of the automatic stay pursuant to 11 U.S.C. § 362, and due to the insufficiency of adequate protection payments that it received.

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[6] The District Court record shall be cited to as "R-___-___-___" for volume number, document number, and the page number. Additionally, the Bankruptcy Court Record in this case is maintained in three separate volumes. The third volume received by the District Court contains the transcript of the full-day trial held by the Bankruptcy Court on February 26, 1991. The Bankruptcy Court trial transcript shall be cited to as "T.___" for page number. References to the Bankruptcy Court record contained in the other two volumes of exhibits will be cited by their Bankruptcy Court record number as "BR.___".

Contrary to the Petitioner's assertions, Respondent's predecessor-in-interest, Paccar, did *not* limit its total claim to $413,561.71. Indeed, Paccar timely filed a "Motion for Allowance of and Proof of Administrative Expense and Claim" ("Administrative Expense Motion"). (BR.182). The sums owing on Paccar's retail installment contracts/security agreements at the time that Paccar's Administrative Expense Motion was filed amounted to $413,561.71, subject to increase for allowed interest and attorney's fees accrued thereon up to a total of $465,861.40. (BR.185).

The Petitioner himself entered into a consent order on March 30, 1988 which by its express terms permitted Respondent to assert its administrative claim in bankruptcy. Also, at the very same hearing pursuant to which the consent order lifting stay was entered on March 30, 1988, the Petitioner concurrently filed his own Motion to Convert the case to a Chapter 7 liquidation proceeding. Consequently, it is inequitable for the Petitioner to *now* argue that compliance with the Georgia MVSFA is mandatory, especially when no benefit to the bankruptcy estate could have resulted from attempting to redeem the very same collateral that the Petitioner had already voluntarily and irrevocably abandoned in a Chapter 7 liquidation proceeding.

(4) The Petition, in the text accompanying footnote 5, also alleges that the Bankruptcy Court based its award pursuant to 11 U.S.C. § 507(b) upon the amount that Respondent paid to Paccar under the recourse obligation. This is also patently misleading.[7]

During the trial held before the Bankruptcy Court, counsel for Respondent established that the total diminution in value of Respondent's collateral amounted to approximately $489,614. (T.104). However, the Bankruptcy Court sought to

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[7] Petitioner improperly alleges that the amount Respondent paid to Paccar pursuant to its recourse obligation was, according to the District Court, "related to and corresponded with the amount of decrease in value of the collateral during the pendency of the case, a conclusion that was not made or considered by the Bankruptcy Court." Petitioner's assertions are not supported by the record.

equitably *limit* the award of Respondent's administrative priority claim pursuant to 11 U.S.C. § 507(b) to the $370,915.96 that it was required to tender to Paccar, its predecessor-in-interest, pursuant to a recourse obligation incurred as a consequence of the diminution in value to its collateral. According to the Bankruptcy Court, the recourse obligation was the best evidence of the damages incurred by Respondent as a result of the diminution in value to its collateral. This was because real dollars, a real loss, was incurred by Respondent from the recourse obligation, and the Bankruptcy Court determined that this was better evidence than the opinion testimony of the expert witnesses introduced by both parties.

While the Bankruptcy Court established that Respondent's collateral had clearly diminished in value due to the automatic stay during the pendency of the bankruptcy case, and that Respondent's claims clearly exceeded the $370,915.96 awarded as an administrative priority claim, the equitable limitation of the award to $370,915.96 was designed to prevent any "windfall" to Respondent. Consequently, contrary to the Petitioner's assertions, the Bankruptcy Court's award of an administrative priority claim to Respondent was not *based* upon this amount. Rather, the Bankruptcy Court intended to equitably *limit* the award to Respondent based upon the uncompensated diminution in value of its collateral which it contended amounted to approximately $489,614. The Bankruptcy Court stated the following:

> . . . One other point I want to make sure you understand, and I want it clear on the record, when I say, "Make you whole," I'm talking about that period during the administration of the Chapter 11, point A to point B where your collateral was actually being used for the benefit of all creditors. And that is where you suffered the loss.
>
> Now, I don't have to make you whole with respect to your general breach of contract claim . . . That is not entitled to the priority status. (T.109).

However, the Bankruptcy Court refused to comment on the validity of such a general unsecured "deficiency" claim, and it determined that such an unsecured claim would be

subject to objection by the Petitioner, pursuant to any applicable state law, including the MVSFA, precisely because such a general unsecured claim would be the type of "deficiency" that the MVSFA was expressly intended to address. (T.200). Accordingly, Respondent has not, at any point in the proceedings below, attempted to pursue such a contractual deficiency claim because of the application of the Georgia MVSFA to such claims.

(5) Petitioner alleges, "Despite the Debtor's failure to timely comply with the adequate protection arrangement, Paccar did not aggressively prosecute its remedies under the Bankruptcy Code." These assertions are patently untrue. The record will reflect that Respondent asserted and protected its rights in its collateral used by the Debtor and diligently attempted to collect amounts due from the Debtor on a timely basis, at every stage of the case. *See* Respondent's "Brief of Appellee" filed with the District Court, pages 4-7 (R-1-2-4/7), and Respondent's "Brief in Response to Appellant's Reply", pages 8-9 (R-2-7-8/9).

Further, Paccar filed its Motion for Relief from Stay and for Adequate Protection on March 20, 1987, *less than one month after Debtor commenced its bankruptcy case on February 25, 1987.* This action by Respondent's predecessor-in-interest is representative of the vigilant and ongoing efforts which Respondent has made in attempting to secure its rights throughout the entire case.

(6) The Petition at footnotes 5 and 11 alleges that Respondent failed to establish the value of the collateral in question. This argument is flawed, overly simplistic, and overlooks the voluminous evidence established by Respondent at trial on February 26, 1991.

At trial, the Bankruptcy Court took the position that if Respondent established a diminution in the value of its collateral, the loss would be measured by the difference between the fair market value of the property at the time that the Debtor filed its Chapter 11 petition and the time that the automatic stay was lifted, less adequate protection payments previously made by the Debtor. (T.24, 33-35).

Respondent's expert witness testified extensively about the damages that occurred to the tractors due to the automatic stay during the pendency of the bankruptcy case. Respondent also testified about the fair market value of the tractors at issue as of the time the Chapter 11 bankruptcy was filed. The valuation was made based upon the particular specifications for each of the individual tractors at issue. The cumulative value of the tractors at the time that the bankruptcy was filed was $575,000, based upon criteria established in a nationally recognized and authoritative valuation publication called the "Blue Book". (T.45-47).

The Bankruptcy Court considered and rejected the Petitioner's argument that on February 25, 1987, the day that the Debtor filed its Chapter 11 bankruptcy case, Respondent should have physically inventoried and inspected all twenty-six (26) tractors on that date (T.114). The Bankruptcy Court noted that such a requirement, as a practical matter, would have been impossible to administer. This was primarily due to the fact that the vehicles were constantly travelling throughout different parts of the country, that it would impose an undue financial burden on the Debtor, that it was not called for by the Bankruptcy Code, and that no one could possibly physically inspect all or necessarily any of the vehicles on or around those dates. (T.114-123). The Bankruptcy Court indicated that for the foregoing reasons, such a task as a matter of course is never performed. (T.115).

Petitioner goes to great lengths to try to impeach Respondent's reliance upon the Blue Book as a basis for determining the value of the tractors at the time of the Chapter 11 filing. This argument completely overlooks the fact that *Petitioner's own expert witness used the Blue Book to determine the value of the tractors at the time that the Chapter 11 bankruptcy was filed.* (T.127-128).

The Bankruptcy Court determined that Respondent had met its burden of proof:

> What if we just stop everything right now, have evidence that the trucks in question, whatever they are, tractors, were worth $575,000 on day one. And when the things are brought back in, it was a basket

> case. It ultimately sold for $60,000 scrap value. So, isn't that some evidence that I could pin my hat on and hang my hat on and say that they got a diminution in value here? (T.122-123).

The District Court also determined that the factual findings of the Bankruptcy Court were supported by the record and that such findings were not clearly erroneous. "These factual findings have support in the record and this Court cannot say that they are clearly erroneous." (R-2-10-20); Appendix B of the Petition, pages 28a through 29a. Consequently, there was ample evidence to support the Bankruptcy Court's award and the District Court's affirmance thereof.

(7) The Petition at footnote 3 and accompanying text alleges that Paccar failed to send the required notices under the Georgia MVSFA, O.C.G.A. § 10-1-36, on a timely basis and failed to comply with the "commercially reasonable" sale requirements under the Georgia Uniform Commercial Code, O.C.G.A. § 11-9-504(3). Specifically, the Petitioner asserts that there was no evidence that the public sale of the collateral was advertised. Even though these allegations are completely irrelevant to the equitable basis of Respondent's claims under 11 U.S.C. § 507(b), Petitioner's allegations ignore the facts. The collateral was advertised by Paccar for sale, and this was acknowledged by the Bankruptcy Court at the trial on February 26, 1991. (T.81-82).

Moreover, Paccar disposed of the tractors at public sale only after giving prior written notice by certified mail to all interested parties of the Debtor's right to redeem the collateral prior to its disposition, and of Paccar's intention to assert its right to pursue the Debtor for any resulting deficiency. (T.64). These allegations have relevance only if the basis for Respondent's claims is grounded upon state law, which it is *not*.

(8) Contrary to the Petitioner's assertions that the tractors were returned to Paccar shortly after the entry of the March 30, 1988 consent order, "during the end of March and the beginning of April of 1988," the vehicles were not collected or made readily available to Paccar by the Petitioner or the Debtor. (T.61-62). Paccar had to locate and physically

reclaim the tractors over a number of weeks and months subsequent to the entry of the above-referenced order. In fact, the tractors were located across at least two states. (T.51). Though a number of the tractors were located and reclaimed by Paccar within a month or so after the entry of the consent order (BR.184), at least one of the tractors was returned as late as August 13, 1988. (T.53).

(9) Petitioner alleges that the Court of Appeals determined that "the Debtor's use of its own property postpetition created an independent claim in favor of Respondent . . . " This argument conveniently overlooks the fact that the tractors used by the Debtor were financed by Paccar and were subject to a first priority security interest held by Paccar in those tractors. Further, the only reason Paccar did not obtain the immediate return of those tractors after Debtor filed its bankruptcy petition was because an adequate protection order was given to Paccar after it filed its motion to lift stay, less than a month after Debtor commenced its Chapter 11 bankruptcy proceeding.

Indeed, the Court of Appeals accurately made the following observation:

> . . . [T]his case does involve a post-petition transaction beneficial to Debtor's estate rather than a mere continued use of the truck by Debtor. Paccar consented to forgoing foreclosure on its secured collateral only after negotiating for adequate protection payments in return for leaving the trucks in Debtor's possession.[8]

(10) Petitioner further alleges that the District Court determined that the Bankruptcy Code and federal equitable principles "created claims in favor of Respondent even if the claims otherwise did not exist under applicable substantive law." Petitioner again disregards the District Court's determination that an administrative expense claim brought pursuant to 11 U.S.C. § 507(b) is "a creature of the Bankruptcy

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[8] 991 F.2d 682, 686 (11th Cir. 1993); Appendix A of the Petition, pages 6a through 7a.

Code and its existence can be attributed directly to the policy decisions made by Congress." (R-2-10-13); Appendix B of the Petition, page 23a. The District Court held that such a claim was not a "deficiency" claim subject to determination according to state deficiency law statutes. *Id.* The District Court in fact concluded:

> [Respondent's] administrative expense claim is thus part of a carefully balanced system of benefits and burdens created by Congress. *The claim arises from the unique circumstances of a bankruptcy case and is legally distinct from any nonbankruptcy theory.* It is not a deficiency claim. (Emphasis supplied). (R-2-10-15); Appendix B of the Petition, page 25a.

(11) The Petition at footnote 2 alleges that the Court of Appeals mistakenly asserted that the "Trustee," i.e., the Petitioner, benefitted from the use of Respondent's collateral. However, throughout its May 20, 1993 opinion, the Court of Appeals clearly recognized that the Debtor-in-Possession and the bankruptcy estate, not the Petitioner, actively used and caused the diminution in value to Respondent's collateral. Indeed, the Court of Appeals' occasional use of the term "Trustee", at least in the context of the Debtor-in-Possession's operation of its business in a Chapter 11 context, is proper. 11 U.S.C. § 1107(a) provides in pertinent part that a Debtor-in-Possession shall "have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter."

(12) Petitioner alleges that Respondent's predecessor-in-interest, Paccar, entered into a consent order requiring Debtor to make monthly payments of $18,661.25. In fact, the monthly payments were $19,651.40. Petitioner also alleges that the monthly payments were subsequently reduced to $15,890.80 after three (3) of the twenty-six (26) tractors were paid in full by the Debtor. In fact, the monthly payments were reduced to $16,680.95. The numbers referred to by the Petitioner are possibly based upon typographical errors contained in pleadings filed very early in the case by Paccar prior to Respondent's involvement. However, Respondent corrected this information in pleadings filed prior to the February 26,

1991 trial by the Bankruptcy Court, and this corrected information was also contained in every brief filed by Respondent with the District Court and Court of Appeals as well.

The referenced consent order was an *adequate protection order* which was entered on May 19, 1987 pursuant to 11 U.S.C. § 362(d)(1), *not* 11 U.S.C. § 361. Though Petitioner alleges that $108,500 in adequate protection payments were made by the Debtor during the course of the Chapter 11 bankruptcy proceeding, Petitioner fails to mention Respondent's entitlement to the additional $67,715.53 in unpaid adequate protection payments which Respondent was awarded pursuant to the Bankruptcy Court's May 19, 1987 Adequate Protection Order.

## SUMMARY OF ARGUMENT

Petitioner has failed to establish, pursuant to Sup.Ct.R. 10.1, the basis for granting his Petition for Writ of Certiorari. Petitioner has failed to demonstrate *any* conflict between the opinion of the Eleventh Circuit Court of Appeals and any decision of the Supreme Court, the Eleventh Circuit, or another Circuit Court of Appeals. Indeed, as circumscribed by 11th Cir.R. 35-3, the Petition for Rehearing En Banc filed by Petitioner to the Eleventh Circuit Court of Appeals was denied for these reasons.

Petitioner has failed to establish any meritorious argument for consideration by this Court. Petitioner claims that this case "involves important issues of federal bankruptcy law and its relationship to state law." However, this case does not involve any interplay between federal bankruptcy law and state law, because state law is not applicable to the type of administrative priority award that was made to Respondent pursuant to 11 U.S.C. § 507(b).

While state law may be relevant to the determination of causes of action based upon a pre-bankruptcy transaction between a creditor and the debtor, state law has no application or relationship to 11 U.S.C. § 507(b), which *only* arises due to a new relationship forged between a secured creditor and the debtor *after* (1) a bankruptcy case has been filed; (2) a

secured creditor has moved for and obtained an adequate protection order pursuant to 11 U.S.C. § 362(d)(1) or such other provision of the Bankruptcy Code; and (3) there has been a diminution in value to the secured creditor's collateral which was not fully compensated for by the negotiated adequate protection payments made pursuant to the Bankruptcy Code. Respondent's rights pursuant to 11 U.S.C. § 507(b) arose as a consequence of the bankruptcy case, not because of state law.

The Petitioner has failed to cite any case on point showing that the measurement of a diminution in value claim pursuant to 11 U.S.C. § 507(b) is dependent on state law. This is precisely so because Petitioner's reliance upon the MVSFA, O.C.G.A. § 10-1-36, and the Georgia Uniform Commercial Code, O.C.G.A. § 11-9-504, in this instance is inapposite and misplaced.

The Petitioner ignores that Respondent's Administrative Expense Motion did not seek to assert a deficiency claim. Had Respondent sought to assert a *deficiency* against the Debtor, such a deficiency would have been calculated by referring to the remaining sums outstanding on the retail installment contracts/security agreements involved in this case and deducting therefrom the proceeds obtained at public sale.

Instead, Respondent sought and obtained a superpriority administrative expense pursuant to Bankruptcy Code Section 507(b) due to the *diminution in value* of its collateral during the pendency of the case and the inadequacy of adequate protection payments received, without making *any* reference to the remaining sums outstanding on the retail installment contracts/security agreements involved in this case. Respondent has, in fact, not attempted to assert a contractual deficiency claim in the proceedings below precisely because of the application of the Georgia MVSFA to such claims.

Further, it is inequitable for the Petitioner to *now* argue that compliance with the MVSFA is mandatory when the Petitioner entered a consent order on March 30, 1988 which by its express terms permitted Respondent to assert its administrative claim in bankruptcy. Indeed, at the very same hearing pursuant to which the consent order lifting stay was entered

on March 30, 1988, the Petitioner concurrently filed his own Motion to Convert the case to a Chapter 7 liquidation proceeding.

Consequently, no benefit to the bankruptcy estate could have resulted from attempting to redeem the very same collateral that the Petitioner had already voluntarily and irrevocably abandoned, particularly in a Chapter 7 liquidation proceeding.

With respect to the factual issues considered, Respondent proved during the trial conducted by the Bankruptcy Court on February 26, 1991, that its collateral had diminished in value by at least approximately $489,614 during the pendency of the Chapter 11 case in excess of the amount of adequate protection payments which it received, and that the loss was in fact caused by the automatic stay.

This sum was proven at trial before the Bankruptcy Court. The equitable limitation of the award to $370,915.96 was designed to prevent any "windfall" to Respondent. Consequently, contrary to the Petitioner's assertions, the Bankruptcy Court's award of an administrative priority claim to Respondent was not based upon this amount. Rather, it served to equitably *limit* the award to Nalley based upon the diminution in value of its collateral which it contended amounted to approximately $489,614.

The Court of Appeals and the District Court determined that there was sufficient evidence proven by Respondent on the record to determine that the Bankruptcy Court was *not* clearly erroneous in its factual determinations and that the record provided sufficient evidence to fully affirm the Bankruptcy Court's award to Respondent of a priority administrative claim pursuant to 11 U.S.C. § 507(b).

Unlike the other types of creditors referred to by Petitioner, Respondent gave new value and agreed to forego its rights in its collateral only after it was given assurances by virtue of the adequate protection order entered by the Bankruptcy Court that it would be made whole for any diminution in the value of its collateral. The parties made a deal in open court, the Bankruptcy Court blessed the deal, and now the Petitioner seeks to back out of the deal.

## ARGUMENT: REASONS FOR DENYING THE WRIT

### 1. THE PETITIONER HAS FAILED TO ESTABLISH A SUFFICIENT BASIS PURSUANT TO SUP.CT.R. 10 TO JUSTIFY A GRANT OF CERTIORARI BY THE SUPREME COURT.

#### A. Petitioner Has Failed to Establish That There Is *Any* Direct Conflict Between The Holding of The Eleventh Circuit Court of Appeals and A Decision of This Court or Another Circuit.

As has been discussed in the Summary of Argument, *supra*, Petitioner has failed to identify *any* direct conflict between the case on appeal and a decision of the Supreme Court or any other Circuit Court of Appeals.

Further, the Petitioner has failed to cite any case on point showing that the measurement of a diminution in value claim pursuant to 11 U.S.C. § 507(b) is dependent on state law. This is precisely because Petitioner's reliance upon the MVSFA, O.C.G.A. § 10-1-36, and the Georgia Uniform Commercial Code, O.C.G.A. § 11-9-504(3), are inapposite and misplaced.

#### B. Petitioner's Inequitable Arguments are Flawed and Defeat the Very Purpose of Chapter 11 of the Bankruptcy Code to Promote the Rehabilitation of A Debtor in Bankruptcy.

The Bankruptcy Court summed up the tenor of the arguments and positions asserted by the Petitioner as follows:

> THE COURT: The problem I have with your position, Mr. Nason [counsel for Petitioner], is if I really interpreted the statute [11 U.S.C. § 507(b)] and the elements of that statute the way you are interpreting them, you would never get a Chapter 11 beyond day one. This is the truth. This is not what Congress intended. Congress did not make – Congress did not intend that – to make it extremely difficult for lenders to come forward in a Chapter 11 and either negotiate adequate protection or to

> lend fresh cash with cash collateral orders. The object of Chapter 11 is to keep the wheels of commerce turning. It's to keep the business going to try to salvage an on-going business. *If I agreed with your interpretation, and I realize it's pure hindsight, I would throw up so many roadblocks to a Chapter 11, you would never get one past day one. I might as well just abort it and put it into Chapter 7. No lender in its right mind would ever come near the Chapter 11 court voluntarily and say, "Here's fresh cash or here's an agreed upon Adequate Protection Order."* (Emphasis supplied.)
>
> Mr. Nason, that is not the way Chapter 11 is supposed to operate.
>
> MR. NASON: Yes, sir, I can understand what Your Honor is saying . . . (T.118-119).

The District Court also formed its own opinion of the Petitioner's inequitable arguments and positions as follows:

> In the view of this Court . . . *[Petitioner's] argument is based upon flawed conceptions of both Georgia's law of foreclosure and administrative claims in bankruptcy.* This Court finds that the alleged inadequacies in [Respondent's] post repossession conduct does not negate the existence of [Respondent's] claim against the debtor's estate. Moreover, this Court is not persuaded that an administrative expense claim can be considered a deficiency claim. (Emphasis supplied.) (R-2-10-12); Appendix B of the Petition, page 23a.

The Court of Appeals likewise took issue with the arguments put forth by Petitioner:

> At the outset, we must clarify the nature of [Respondent's] claim in order to focus on the issues actually involved in this case. The [Petitioner] argued both in his briefs and at oral argument that [Respondent's] claim is barred by Paccar's alleged failure to comply with foreclosure laws of the State of Georgia. The [Petitioner] contends that because

> Paccar failed to carry out foreclosure and sale of the collateral according to the terms of the Georgia Motor Vehicle Sales Finance Act and the Georgia Commercial Code, [Respondent], as successor-in-interest, cannot assert a claim against Debtor's estate based on the loss suffered by Paccar when the sale of the collateral produced less than the balance due on the purchase money notes.
>
> *This argument misses the point. A claim for administrative expenses under 11 U.S.C. § 507(b) is not a claim for a deficiency on the underlying obligation which financed Debtor's purchase of the collateral.* The [Petitioner] appears to be correct in asserting that compliance with state law controls a creditor's right to claim, against the bankruptcy estate, a deficiency on a contract after foreclosure of a lien. *We need not reach this question, however, because this case does not present that issue. Instead of a contract deficiency claim, [Respondent] asserts a claim for administrative expenses for the value of goods furnished to the bankruptcy estate after imposition of the automatic stay . . .* (Emphasis supplied.) 991 F.2d 682, 685 (11th Cir. 1993); Appendix A of the Petition, page 4a.

### C. Petitioner Is Attempting to Deprive Secured Creditors in Bankruptcy of the Right to Protect the Value of Their Collateral During the Imposition of the Automatic Stay in Bankruptcy.

Petitioner fallaciously argues that state law creates *all* claims between a creditor and debtor in bankruptcy, and that claims should be treated the same in federal and state courts,[9] citing *Butner v. United States*, 440 U.S. 48 (1979), in support of this assertion. However, *Butner* addressed the question of whether a pre-petition security interest in real property extends to post-petition rents and profits derived from the

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[9] Petition at pages 8 and 13.

property. *Butner* did not even contemplate or attempt to address the post-petition creation or existence of administrative priority claims in bankruptcy based upon a debtor's use of a secured creditor's collateral and the resulting diminution in value of the collateral due to the imposition of the automatic stay in bankruptcy.

Petitioner also argues that the impact of the Court of Appeals' opinion will be adverse and far reaching if not reversed. To the contrary, reversing the lower courts' holdings in this case would unravel those provisions of the Bankruptcy Code specifically designed to induce secured creditors into continuing to transact business with a debtor-in-possession and to continue furnishing goods and services to the debtor in order to rehabilitate the debtor's business in Chapter 11.

The message that would be sent throughout the secured creditors' community by reversing the Eleventh Circuit Court of Appeals would be to inform secured creditors that under no circumstances will they be made whole for their losses when their collateral diminishes in value in excess of the adequate protection payments received. Petitioner wants to deprive secured creditors such as Respondent of the benefit of their bargain retroactively. Petitioner seeks to use state law as a sword to deprive secured creditors who enter into post-petition transactions in order to rehabilitate the Debtor from recovering for the unanticipated reduction in value to their collateral during the pendency of the bankruptcy case.

Petitioner argues that other Chapter 11 administrative expense claimants will not be paid in full, and that pre-petition claimants will not receive anything. However, the Respondent was induced to do business with the Debtor *after* the bankruptcy case was filed, and unlike the pre-petition and post-petition unsecured creditors referred to by Petitioner, Respondent had valuable collateral that it was entitled to repossess. Due to the imposition of the automatic stay in bankruptcy and the prompt entry of an adequate protection order after the bankruptcy case was initiated, Respondent was induced into refraining from repossessing its valuable collateral in exchange for the guarantee of satisfactory adequate protection payments.

Consistent with this analysis, the Court of Appeals determined the following:

> . . . [T]his case does involve a post-petition transaction beneficial to Debtor's estate rather than a mere continued use of the trucks by Debtor. Paccar consented to forgoing foreclosure on its secured collateral only after negotiating for adequate protection payments in return for leaving the trucks in Debtor's possession. Facing a similar claim of administrative expenses for failed adequate protection, the court in *In re Mutschler*[10] stated:
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> Section 503(b)(1)(A) of the Code entitles a creditor to administrative priority for any claim representing an actual and necessary cost of preserving the estate. Section 507(b) is an adjunct to the adequate protection alternative set forth in section 361 . . . Adequate protection is a means of preserving a creditor's interest in secured collateral subject to post-petition use by the debtor. *Presumably such use is desired by the debtor and is contributing to the reorganization effort. Otherwise, the debtor would doubtless return the collateral and forgo providing adequate protection. This beneficial use by the debtor is normally "paid for" by the adequate protection.* Where adequate protection becomes inadequate or otherwise fails and the use nonetheless continues, section 507(b) comes into play by covering the creditor's unprotected interest by according it priority administrative expense status. (emphasis added) . . . 991 F.2d 682, 686 (11th Cir. 1993); Appendix A of the Petition, pages 7a through 8a.

Accordingly, Petitioner has chosen to disregard that Respondent's award pursuant to 11 U.S.C. § 507(b) was based upon its entitlement to adequate protection payments which were insufficient to fully compensate it for the diminution in

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[10] 45 B.R. 494, 496 (Bankr. D.N.D. 1984).

value to its collateral. This award was based upon federal equitable principles and the Bankruptcy Code, *not* state law.

## 2. THE COURTS BELOW PROPERLY RULED UPON THE ISSUES ADJUDICATED BETWEEN PETITIONER AND RESPONDENT, THEREBY JUSTIFYING THE AWARD OF $370,915.96 PURSUANT TO 11 U.S.C. § 507(b).

### A. Petitioner Incorrectly Asserts that the Origin of All Rights Established Under the Bankruptcy Code Are Derived from State Law.

Petitioner contends that "The Bankruptcy Code is essentially a prioritizing scheme" and that "Claims against a bankruptcy estate are created and determined under state law." Petitioner cites two cases, *Matter of Winslow,* 39 B.R. 869 (Bankr. N.D.Ga. 1984), and *In re Kahihikolo,* 807 F.2d 1540 (11th Cir. 1987) (containing dicta referring to the *Winslow* case), allegedly for the proposition that "[o]nce the automatic stay is lifted, the parties' rights revert to those under state law."[11]

However, the *Winslow* case dealt with a creditor's attempt to assert a general unsecured *deficiency* claim against the estate after the repossession and sale of Debtor's vehicle in which it had a security interest. That case did not involve an adequate protection order. It also did not deal with the ultimate insufficiency of those adequate protection payments to offset the diminution in value of the secured creditor's collateral and that creditor's subsequent claim for a super-priority administrative expense pursuant to 11 U.S.C. § 507(b).

Petitioner argues that pursuant to the Georgia MVSFA, Respondent lost all rights to a deficiency claim against the Debtor or the bankruptcy estate. In support of this proposition, Petitioner improperly cites *Redman Industries v. Tower*

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[11] Petition at page 10.

*Properties, Inc.*, 517 F. Supp. 144 (N.D.Ga. 1981).[12] That case concerned the Georgia real estate mortgage "confirmation statute", which was designed to protect debtors from deficiency judgments obtained by mortgage lenders in the event their *real property* has been sold at a foreclosure sale for less than fair market value. *Redman* is inapposite to the facts of the instant case because (1) personal, not real property was at issue in the instant case; (2) Respondent's award, made pursuant to 11 U.S.C. § 507(b), was based upon the diminution in value which occurred to Respondent's collateral subsequent to the imposition of the automatic stay in bankruptcy, not upon a state law deficiency claim; and (3) Respondent's collateral was not sold at or below its market value.

Petitioner also alleges that "[u]nder § 558 of the Bankruptcy Code, the estate has the benefit of any defenses that would be available to the debtor as against any entity."[13] This argument is superfluous, since the March 30, 1988 consent order which granted Paccar relief from the automatic stay to obtain possession of the collateral was made when the Petitioner had already been appointed a Trustee in the case. This consent order was entered by Petitioner himself and provided, in pertinent part:

> The within order is . . . entered *without prejudice* to the Movant *in regard to Movant's right to assert an administrative claim in regard to the adequate protection payments which were not made by Debtor, and without prejudice to Movant's right to assert any other claims it may have against the Estate of Debtor*. (Emphasis supplied.) (BR.177-178).

11 U.S.C. § 558 is therefore inapplicable, because at the time the consent order was entered, the Debtor was neither the party which dealt with Respondent nor was even possessed at that time with the right to object to the disposition of the vehicles made the subject of the Petition.

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[12] Petition at page 10, footnote 9, and at page 20. Petitioner mistakenly refers to this case throughout his Petition as *Redmond Industries, Inc. v. Tower Properties, Inc.*, 517 F.Supp. 144 (N.D.Ga. 1981).

[13] Petition at page 10, footnote 10, and at page 21.

Petitioner also refers to 11 U.S.C. § 502(b)(1)[14] in a further attempt to contest Respondent's award pursuant to 11 U.S.C. § 507(b). Not only is the application of 11 U.S.C. § 507(b) *not* affected by 11 U.S.C. § 502(b)(1), but 3 *Collier on Bankruptcy* ¶ 502.02, p. 502-29 (15th ed. 1993), also states, "This is not to suggest that the claim is allowed only for the value of the collateral. It is allowed in the full amount that it is valid."

Finally, Petitioner contends that "Respondent has implicitly recognized that state law is not irrelevant", and alleges that Respondent limited its unsecured claim to $413,561.71.[15] *See* numbered paragraph (3) of Respondent's Statement of the Case in this Brief, *supra*, which thoroughly addresses and disproves Petitioner's contentions in this regard. Contrary to the Petitioner's assertions, Paccar did *not* limit or "cap" its total claim to $413,561.71.

Petitioner concludes his dubious argument by alleging that " . . . § 507(b) is designed to make a creditor 'whole' if it receives everything it is entitled to under its loan documents and state law."[16] Petitioner fundamentally disregards the nature of diminution in value claims awarded pursuant to 11 U.S.C. § 507(b). They are not made pursuant to the diminution in value or cancellation of the underlying loan documents or pursuant to the application of an anti-deficiency statute. Rather, they are made pursuant to the diminution in value of the *collateral* which constitutes the security for a debtor's obligation to a secured creditor.

### B. Respondent's Award Pursuant to 11 U.S.C. §§ 507(b) and 503(b) Was Based Upon Debtor's Ability to Use and Benefit from Respondent's Collateral in Exchange for Adequate Protection.

The Petitioner alleges that Respondent's § 507(b) award did not arise because of the diminution in value of its collateral, but rather "under its prepetition notes with the

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[14] Petition at page 21.

[15] Petition at page 13, footnote 14, and accompanying text.

[16] Petition at pages 13-14.

Debtor."[17] Petitioner is unable to support this implausible and misguided argument other than by asserting that Respondent did not provide any benefit to the Debtor that would justify an award for the "actual, necessary costs and expenses of preserving the estate" pursuant to 11 U.S.C. § 503(b). Petitioner particularly relies upon two cases to support these assertions, *In re Advisory Information and Management Systems, Inc.*, 50 B.R. 627 (Bankr. M.D.Tenn. 1985),[18] and *In re James B. Downing & Co.*, 94 B.R. 515 (Bankr. N.D.Ill. 1988).[19]

However, Petitioner's tortuous logic is contrary to the holding of every court below, especially the Court of Appeals, which expressly recognized the benefit to the estate conferred by Respondent's collateral. Indeed, the Court of Appeals addressed Petitioner's contentions as follows:

> The cases relied upon by the [Petitioner] are readily distinguishable from the case at bar . . .
>
> [5] Unlike the creditors in *Advisory Information and Management Systems* and *James B. Downing*, [Respondent's] predecessor-in-interest utilized the statutory procedures provided for protection of its collateral in the possession of Debtor. [Respondent] does not proffer § 503 as an alternative to adequate protection of its secured claim. *Instead of merely sitting back and allowing Debtor to continue using the tractors, Paccar asserted its undeniable right to repossession and agreed to forgo repossession only after and because Debtor consented to paying adequate protection. Therefore, [Respondent's] administrative expense claim is not barred under the inaction theory which controlled in Advisory Information and Management Systems* and *James B. Downing*. (Emphasis supplied.) 991 F.2d 682, 687 (11th Cir. 1993); Appendix A of the Petition, pages 8a through 10a.

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[17] Petition at pages 12-14.

[18] Petition at pages 12, 16-17.

[19] Petition at page 14.

Petitioner also cites to *In re Subscription Television of Greater Atlanta*, 789 F.2d 1530 (11th Cir. 1986),[20] and reiterates the same tired "benefit to the estate" argument. However, the Court of Appeals distinguished *In re Subscription Television of Greater Atlanta* as follows:

> The debtor in the case at bar enjoyed more than mere potential post-petition use of collateral. *Rather than entertaining a speculative benefit, the Trustee [Debtor] actively used Paccar's collateral throughout its post-petition possession. This is not disputed. The reasoning of Subscription Television,* therefore, leads to the conclusion that [Respondent] is entitled to an administrative expense priority because the Trustee [Debtor] actually used the collateral to the benefit of the debtor's estate. Because this case does not involve a debtor's potential use of collateral, the [Petitioner's] reliance on *Subscription Television* is misplaced. (Emphasis supplied.) 991 F.2d 682, 687-688 (11th Cir. 1993), Appendix A of the Petition, pages 10a through 11a.

The Court of Appeals' analysis is entirely correct, since Debtor's use of Respondent's collateral, the over-the-road tractors, was the *sine qua non* of Debtor's business, and it is inequitable for the Petitioner to now argue that Debtor's ability to use Respondent's collateral during the Chapter 11 bankruptcy did not provide new value or a benefit to the estate. The fact that the Debtor entered into the Adequate Protection Order with Respondent (Paccar) is testimony to that value and benefit conferred upon the Debtor and the bankruptcy estate.

### C. The Statutory History and Case Law Interpreting 11 U.S.C. §§ 507(b) and 361(3) Expressly Establish that the Former Is Neither Controlled Nor Limited by the Latter.

The Petition, at pages 15 through 21, ineffectively attempts to show that some type of conflict exists between 11

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[20] Petition at page 17.

U.S.C. §§ 507(b) and 361(3). This novel argument was first raised in earnest by Petitioner in his Reply Brief filed with the Eleventh Circuit Court of Appeals.

Petitioner's arguments concerning the interplay between 11 U.S.C. §§ 507(b) and 361(3) demonstrate a profound disregard for the statutory and case history of both of these provisions. The Court of Appeals, in its September 30, 1993 opinion[21], denied Petitioner's Motion for Rehearing and Suggestion of Rehearing En Banc based upon these arguments.

The September 30, 1993 opinion of the Court of Appeals clearly and succinctly dispatched Petitioner's arguments concerning 11 U.S.C. § 361(3) along with Petitioner's other arguments. The Court of Appeals elaborated upon the legislative history of these provisions and accompanying case law pertaining thereto in support of its denial of Petitioner's Motion for Rehearing and Suggestion of Rehearing En Banc.

Additional legislative history is found at 124 Cong. Rec. H 11092 (Sept. 28, 1978), which provides in pertinent part:

> Section 361(4) of H.R. 8200 as passed by the House is modified in section 361(3) of the House amendment to indicate that the court may grant other forms of adequate protection, other than an administrative expense, which will result in the realization by the secured creditor of the indubitable equivalent of the creditor's interest in property . . . Adequate protection of an interest of an entity in property is intended to protect a creditor's allowed secured claim. *To the extent the protection proves to be inadequate after the fact, the creditor is entitled to a first priority administrative expense under section 507(b).* (Emphasis supplied.)

Both 11 U.S.C. §§ 507(b) and 361(3) took effect on October 1, 1979 when the present Bankruptcy Code became effective. Based upon the referenced legislative and case

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[21] 4 F.3d 940 (11th Cir. 1993), Appendix D of the Petition, pages 35a through 37a.

histories of these provisions, it is disturbing but not unexpected that Petitioner should choose to ignore this background in arguing that these provisions are somehow incompatible. Presumably, Congress was aware of what it was doing when it enacted these provisions of the Bankruptcy Code at the same time.

### D. The Concept of "Equality of Distribution" Advocated By Petitioner Pertains to Unsecured Creditors Who Have Not Been Required to Place Collateral At Risk During the Pendency of the Debtor's Chapter 11 Case.

Petitioner relies on the principle of "equality of distribution" as a talisman to be invoked against Respondent's administrative priority claim created pursuant to 11 U.S.C. § 507(b). By arguing this analysis, Petitioner is attempting to deny Respondent the benefit of its bargain, namely its entitlement to a priority administrative claim for the diminution in value to its collateral as a consequence of the imposition of the automatic stay in bankruptcy.

Equality of distribution is a concept used in bankruptcy analysis to distribute funds equally among unsecured creditors. What the Petitioner materially omits from the equation is that unlike Respondent and its predecessor-in-interest, Paccar, the Debtor's unsecured creditors were neither required to tender any additional funds nor contribute anything of value to the Chapter 11 bankruptcy estate post-petition. The Bankruptcy Court recognized this distinction and stated the policy of Congress with respect to the concept of equality of distribution as follows:

> THE COURT: The other creditors have to pay because Congress said – this is the congressional intent, "We," meaning Congress, "We want to facilitate a reorganization. We want all the creditors to share the risks." Now, we have one special creditor who has got a lien on this type of property, tractors, trailers. Okay. What Congress is saying in Section 507 is, "Look, if we are going to force that secured

> creditor to lie still while the debtor uses the property that is depreciating because the judge is going to keep that stay in effect, we are going to have to furnish adequate protection." And if an adequate protection is not sufficient to make that creditor whole, meaning make him go back to day one and make him whole, then all the creditors have to share that risk because that one creditor is going to be elevated to a priority administrative status. (T.119-120).

Petitioner also cites to *Shapiro v. Saybrook (In re Saybrook Manufacturing Co., Inc.)*, 963 F.2d 1490 (11th Cir. 1992)[22] for the proposition that a pre-petition secured creditor cannot obtain a priority claim over other similarly situated claimants. However, the *Saybrook* opinion dealt with a pre-petition secured creditor who attempted to "bootstrap" its claim in bankruptcy by a cross-collateralization provision that allowed its post-petition financing of the Debtor to not only secure that creditor's post-petition claim but its pre-petition claims as well.

The Eleventh Circuit's analysis of Respondent's claim, pertaining to the diminution in value of its collateral, renders the *Saybrook* opinion irrelevant to the facts of the instant case. Contrary to the Petitioner's assertions, Respondent did not obtain an administrative priority claim "over similarly situated claimants." Rather, Respondent suffered a unique loss occasioned by the failure of negotiated post-petition adequate protection payments to compensate adequately for the diminution in value of its collateral.

Petitioner also argues that *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 162-163, 67 S. Ct. 237, 240 (1946),[23] supports his argument concerning "equality of distribution." However, that case and its progeny expressly hold that in determining what claims are allowable and how the Debtor's assets are to be distributed are *not* dependent on the law of the state

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[22] Petition at pages 17-18.

[23] Petition at pages 19-20.

where the bankruptcy court is located. The bankruptcy court must administer and enforce the Bankruptcy Code in accordance with the authority granted by Congress to determine how and what claims shall be allowed under *equitable principles.*[24]

The *Vanston* decision held that the question of what claims are valid and subsisting obligations against the Debtor, in connection with those *existing at the time a bankruptcy petition is filed*, may be determined by reference to state law in the absence of overruling federal law.

The case at bar, does not involve the law of the State of Georgia precisely because Respondent's § 507(b) administrative priority claim pursuant arose *after* the bankruptcy petition was filed and as a direct consequence of the imposition of the automatic stay in bankruptcy, the provision of adequate protection payments pursuant to an adequate protection order, and the insufficiency of those payments to compensate Respondent for the actual diminution in value of its collateral during the pendency of the bankruptcy case.

The central holding of the *Vanston* opinion therefore remains applicable:

> In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. *Erie Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, has no such implication. That case decided that a federal district court acquiring jurisdiction because of diversity of citizenship should adjudicate controversies as if it were only a state court . . . *But, bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles.* (Emphasis supplied.)

*Vanston,* 329 U.S. at 162-163, 67 S.Ct. at 240 (1946).

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[24] *See* Respondent's Brief of Appellee (R-1-2-42), Respondent's Brief in Response to Petitioner's Reply (R-2-7-11), and the District Court's January 31, 1992 Order (R-2-10-7), Appendix B of the Petition, pages 19a through 29a, for detailed interpretation and clarification of this opinion and its progeny.

*Accord, In re Blehm Land & Cattle Co.*, 859 F.2d 137, 142 (10th Cir. 1988), which held that even if a secured creditor failed to seek court approval of its adequate protection agreement with the bankruptcy trustee/debtor, it was not fatal to the creditor's application for a superpriority administrative expense pursuant to 11 U.S.C. § 507(b):

> In drafting this provision (11 U.S.C. § 507(b)), Congress was concerned that the estate would not have sufficient property to pay administrative expenses in full, thus making such adequate protection valueless. *See* S. Rep. No. 989, 95th Cong., 1st Sess. 54, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5840. *Evidencing the importance with which it viewed the concept of adequate protection, Congress did provide in § 507(b) that, when adequate protection fails, the creditor is entitled to a superpriority administrative claim, above all other regular administrative claims.* (Emphasis supplied.)

The Petitioner simply misreads the *Vanston* case.

## CONCLUSION

For the reasons succinctly stated in Respondent's Summary of Argument, *supra*, and based upon the misguided factual and legal assertions made by Petitioner, Respondent respectfully urges that the Petition be denied.

Respectfully submitted,

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